A TREATISE
Concerning
Eſtates Tayle, and Diſcents of Inheritance.

Written by N. N. *and Publiſhed by* I. SHERMAN, *of Lincolnes Inne: Gen.*

LONDON:

Printed for *Iohn Grove*, and are to be ſold at his Shop in *Chancery Lane*, over againſt the *Subpena* Office. 1641.

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A Treatise concerning Estates Tayle, and discents of Inheritance.

Ou demand (good Sir,) if Estates tayle may bee cut off? whereto I may shortly answer, that every Act for the lawfull execution thereof requires power, and will, without both which onely things eatnall are accomplished; the will naming the worke good or bad, the power giving hability to finish what the will freely intendeth.

deth. This power may truely bee called possibility, inabled either by Nature, or by Law; for that which is unnaturall or against our natures, is not judged possible or in our powers; no more is that which is to be done against the Lawes: for we have no due power to doe ought that is unlawfull, all our powers being subject unto Law; for *illud possumus quod jure possumus*: Now touching the power and authority, to avoyd estates taile, it is plaine that as the making of them was authorized by the Stat. of *West.* 2. so by the Stat. of 4. *H.* 7. *cap.* 24, and 32. *H.* 8. *cap.* 36. Tenent in taile may lawfully cut them off: since therefore the power to create an estate taile, and the power to barre the same in taile are equally warranted by Law; for *a pari potestate par cujusque effectus*, the next doubt will be if our wills or affections, to cut them off doe sort to a lawfull end; which end though it be last in execution, yet ought it to be first Censured; as the first part of all our actions: and touching

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this point, I muſt referre my ſelfe to every man his peculiar conſcience, who can beſt make anſwer in this behalfe what hee intendeth: onely I muſt note by the way, that ſuch as avoyd and cut off theſe eſtates to none other purpoſe but to enlarge their wanton expences, and to give them more ſcope to live licentiouſly, as they unjuſtly ſpoile their Heires of their due Inheritances, ſo ſhall not this my defence extend unto them; ſince my purpoſe onely is to reduce eſtates taile to the moſt proper conveyance of the Common Law. And becauſe ſometime the effects produced of our actions are taken for their ends, whereby they are to be valued, And ſince the fruſtrating of eſtates taile diſpoſeth it ſelfe to none other end then to ſet at liberty theſe fettered Inheritances: To prove therefore whether Inheritance at Common Law, or theſe Statutes, or conditionall gifts are to be preferred; it behoveth me to ſhew you what an Inheritance is, and what an eſtate taile is, that ſo you may

more

more easily conceive their differences. In the Civill Law Inheritance is *Successio in universum jus quod defunctus habebat*, which definition doth well agree with our Common Law, which saith, that an Inheritance is such an estate as may be inherited by the Heire, which estate doth naturally descend to the Heire; as if it were joyned and included in him by a violent motion of the Law: and this discent is that which the Civilians call succession, and our Common Lawyers Inheritance; which so cleaveth to the Heire, as if the Father disseiseth a stranger, and dyeth seised; this Land shall discend to the Heire against his will, and he is Tenant to the precipe though hee never enters. And in like manner shall Lands purchased discend, except the Purchasor doth some Act to the contrary; and except in cases of Attainder: by this I gather that Inheritance is the Act of the Law; for *Nemo est hæres viventis*, no man is Heire of him that is living, and dead men have no power to chuse their Heires:

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therefore I say it must follow that this discent is the act of the Law, and dis-inheriting, or altering the course of Inheritances, the act of the party. The consultation now must be, if the Act of the person may justly make voyd the Act of the Law, wherein we must consider the force of the Lawes, and the hability of persons: first therefore Law as St. *Thomas* saith, is *quædam rationis ordinatio ad bonum commune*, a certaine disposition of reason to common good; which disposition is (by *Frigius*) called a *Coercion* of things voluntary, and not voluntary; whereby it seemeth that if wee will be reasonable creatures, we must submit our selves to the governance of the Law, which as it is said, is the disposition of reason, and the *Coercion* of our wills offending reason: the Law therefore as a mute Magistrate compelleth us to her obedience, warranteth us safety under her Target; and though Lawes were made for men, yet were they not made to rule men, by which I gather, that Lawes are superi-

our to men, and men inferiour to Lawes; the Acts therefore of the Lawes are paramount, or above the Acts of the party; and to draw this my present purpose, since the discent of Inheritance in Fee-simple is wrought onely by the Law; and since these gifts entaile are the naturall issues of mens fantasies, why might I not here conclude that our estimation of estates taile ought to be much inferiour to that estate which the Common Law createth? howbeit since this hath bin spoken generally, and confusedly of all Lawes, and since wee are in this government subject to divers sorts of Lawes in divers respects, it behooveth me to shew you what Lawes doe principally concerne this matter, and how Inheritances are respected in either of them; and since Fee-simples, and estates taile are opposite in their natures, and since likewise the Adage saith, *Ferro aperire viam qui per contraria transit*, I will prove unto you that the proper and naturall discent of Fee-simple is good, and lawfull in all Lawes,

Lawes, by which meanes it will follow, that estates taile being contrary to Fee-simple are not good, nor lawfull, for contraries agree not: Lawes therefore are either Divine or humane, and divine Lawes are either Lawes of nature, or Lawes deluded. But before I speake of humane Lawes, I shall first shew you that the forme of Inheritance which the Common Law supporteth agreeth with the Lawes of nature; and so by consequence with the Lawes of God: for proofe whereof it were enough, considering the perspicuity of the Matter, if I should use the authority of *Plowden*, who saith that nothing in our Common Law is ordained against nature, and yet our Common Law will that Inheritances shall descend to the Heire; but to prove it more particularly, the first Act that nature requires is to procreate, the second to preserve, the third to provide for sustenance, which provision comprehendeth the whole effect of Inheritances: and in the Civill law it is called *hæreditas legitima*,

which is said to appertaine most properly to the Father his office, as *hereditas naturalis* which consists in nourishing and education, belongs to the Mother, and though natures lawes which are onely written in our hearts, have not expressed in any literall manner that this provision or Inheritance, belongeth more to the Heire then to the rest of our Children, or Kindred, yet hath the continuall practise of all ages testified unto us, that the lawes of nature would wee should leave our Inheritances, first rather *natis* then *agnatis*, rather to our Children then to our Cousins, and rather to Sonnes then to Daughters; and if wee have Sonnes, we have likewise a Rule that saith, *Proximus excludit remotiorem*, and in all governments the eldest Sonnes are admitted either to all, or most part of the Inheritance, and in want of Sonnes, Daughters, for whom nature injoynes us rather to provide then for more remote Cousins: and these generall received Customes of all times and places are the best meanes

wee

we have to interpret the lawes of nature, which are onely delivered to us in examples of times past. The second part of God his Lawes are the lawes written, wherein the omnipotent Maker of the world hath discovered unto us in his expresse Words, what his high pleasure is we should doe concerning Inheritances: and though I be not so skilfull in these lawes as I ought to be, yet I have noted out of the Prophet, that he would not so much as suffer the first begotten sonne, even of the hated Wife to bee dis-inherited; neither ought any man to take example of some Holy men, who have crossed this course of Inheritance, considering that it hath alwayes hapned either by the expresse Commandement of Almighty God, and so was *Adonai* dis-inherited by King *David* his father, and the Inheritance bestowed on *Salomon* a younger brother; or else it chanced for some notable crime by the Heire, and so was *Reuben* the Heire of *Jacob* dis-inherited, and his Inheritance given

to the bones of *Joseph*: and this I have repeated to none other purpose then to prove, first that Inheritances are agreeable to the lawes of nature; and lastly that they are commanded by the expresse lawes of God, and therefore ought not but upon speciall cause bee violated: since I have shewed you what I have gathered out of Divine lawes concerning Inheritances, it followeth that I speake somewhat of humane lawes, and namely of our common lawes, for by them are Inheritances onely managed in this government; except in some peculiar places, where Custome, often the daughter of errour, hath indenized and made free degenerating formes of Inheritances, as of Gavel kinde, and Burgh *English*, which custome I must here omit, as more fit for another place; to shew you what our common law is, and what kind of Inheritance it produceth, that so by enquiring what entailes are not, I may discover what they are: our Common law implyeth his definition in his name, for it is

called

called *Communis jus*, *quasi Communis justitia*; common Justice, and it is divided into two parts, old and new; the ancient are such as whereof wee neither know beginning nor ending, and in these lawes entailes were utterly unknowne, and our Inheritances were disposed in the act of the law, onely by discent in Fee-simple, which as Mr. *Littleton* saith, is *hereditas legitima vel pura*, and this Fee-simple was setled on the Heire and his heires by a perpetuall operation of the law. Another sort of Fee-simples conditionall there was likewise I confesse, but this condition was no adition of the law, but onely a restraint of the donor, which restraint was used by our forefathers instead of estates taile, tying thereby the Inheritance to the issue of the body of the Donee, but saving to the donor no Reversion, or at most but a Title, or possibility of a Reversion for want of Heires of the body of the Donee, for Fee-simple admitteth no Reversion, yet could not the Donee alien his estate before he had issue,

and by having issue setled the Inheritance in him; then was this Title, or right to this Reversion of no longer estimation in our law: and this appeareth by the Statute that saith *post prolem habitam potestatem alienandi*, which liberty of the alienation (after he had issue) in mine opinion was just and reasonable; and herein shall my opinion be easily ratified, if it shall bee considered what mischiefes might otherwise happen to the tenent conditionall, if he should still be detained from power to alien after he had issue, for so might he be compelled to admit one, peradventure none of his, or an unworthy heire of vile condition, which no extremity of law requireth: our Common law therefore nothing mistrusting the fathers care to preserve his Inheritance for his heire, gave to the father after hee had issue power to alien at his pleasure, that so he might retaine this power as a bridle to restraine the unrulinesse of Youth, who in his education would peradventure doe better for hope of re-

ward

must then for feare of punishment; or at least doe best being compelled by them both, and herof I would onely gather that Common law is common Justice; and that the ordinary sort of Inheritances commanded by the Law of God, & that though Fee-simple conditionall somewhat swerveth from the purity of Fee-simple, yet that the restraint of the Donee his alienation for the benefit of the donor was just untill the Donee had issue; and that likewise the Donee his liberty to alien after (by having issue) he had setled the Inheritance in himselfe was likewise most just, and herein onely did Fee-simple conditionally differ from gifts in taile, which by the Stat. of *West.* 2. restrained the Donee either by Deed, or fcoffment from prejudicing his issue.

A Section of Stat. Lawes.

ANd now I shall for a while ceale to speake of our ancient Lawes, to remember somwhat of our newer sorts of

lawes commonly called Statutes, which I have termed the newer sort, because wee are assured of the times of their beginnings, and of these new lawes the whole vertue consists, either in commanding things necessary, forbidding things hurtfull, punishing things unjust, or permitting or making lawfull things otherwise unlawfull; concerning any of which when we call in doubt our necessity of obedience to them, wee must consider that such as justly command, or justly forbid, are of more respect then those which onely punish, since the price of the offence against Statutes punishing consists in the measure of the punishments; but such Statutes as onely permits or gives liberty to doe things unlawfull, because they are but authorities to breake the lawes; therefore they are unworthily termed lawes, and by consequence not so to be respected: with this doth St. *Thomas* well agree, saying, *permissio non est officium legis quia lex adfert necessitatem*, sufferance or permission is not the office

office of the law, because the law importeth a necessity, whereby I conceive that such statutes as neither command, forbid, nor punish, are left in our discretions to be kept or broken, except the keeping of them impugne the lawes Divine: it should seeme therefore that since the making of estates taile was but a permission, and no commandement, (for no man is compelled to make them) that it remaineth as a thing indifferent to bee done or undone for ought that appeareth in our Common Lawes; and touching the cutting them off when they are made, I must say as I have said before, that as they were authorised by Statute, so hath later Statutes authorised the cutting them off, the making therefore of them (as now it stands) is but an act voideable, and therefore being made scarcely by good advice, they merit onely a voyd reputation: yea and when they were in their best force before 4. H. 7. or 32. H. 8. though the tenent in taile was so girt to his estate as a Fine levyed by him was not able to barre his issue, yet our

common law scarcely brooking this unnatural brood, carved out of mens imaginations, made divers incursions and breaches upon this knotty kind of Inheritance; sometime by dis-continuance, sometime by warranty lineall with assets, and sometime by collaterall warranties, yea and when the statute of 4. *H.* 7. was after made and scarcely thought sufficient: in 19. *H.* 8. to barre the issue in taile by fine, the Sages of the Law perceiving that while they defended a Reversion in the Donor which in common presumption should never happen, they suffered so many mischiefes to creepe into the body of the law, and so many discommodities to reseant in taile, as they were inforced in the 32. of *H.* 8. to put that ambiguity out of doores, and by Fine to give tenent in taile absolute power to barre his issue; and this I have onely shewed you to none other end then to acquaint you with the inception and progresse of these entailes, out of which I would note that they continued not long in any firme fort, and

that

that a short experience had manifested so many incumbrances proceeding from them: as our fore-fathers fought all convenient meanes to avoyd them; who therefore would adventure after so many sharpe experiences to intaile his land, because intailes are neither warranted by God his Law, nor by the ancient common lawes of this Realme. Againe, since intailes are onely suffered to be made in such manner as we cannot assure our selves that this permission will prove a generall pardon for the offence committed, or a remedy for the mischiefe that happily will ensue; and considering that by intayling we disturbe the common forme of the most rightfull and approved kinds of Inheritances, commanded by Almighty God, who cannot *retractare suum decretum*, and defended by our common law under which wee live, and must of necessity therefore bee good. I may well gather that these new fashioned gifts (being contrary and opposite to all purposes) are undoubtedly to be suspected vitious or very dangerous;

what conſcience therefore ſhould any man make in undoing that which is all begun, or in avoyding that which is made voydable of purpoſe to bee avoyded as unprofitable? And yet I grant that ſome temporall lawes are in conſcience to bee kept according to the rule in Saint *Thomas* who ſaith, *lex quæ ad bonum commune referatur & poteſtatem non excedat ejus qui ipſam condit et ſecundum formam juſtitiæ diſtributivæ ſervata ratione proportionis imponat ſubditis onera & denique utilis ſit habeatque reliquas conditiones*, ſuch lawes in conſcience ought to be kept, but if we examine this our law of *Weſtm.* 2. wee ſhall find it as I have ſaid, no law, but a permiſſion to breake the law; wee ſhall find that long and often proofe hath taught us that it agreeth not with publick good, we ſhall find likewiſe that ſince wee are aſſured that this diſcent in Fee ſimple beſt pleaſeth our Lord, we have ſome cauſe to doubt whether it lyeth in man his power without ſpeciall cauſe to permit by a new law the violation of ſo holy a law, and to be ſhort, it faileth in all points that might

preſſe

preſſe our conſciences: but on the other ſide for the preſervation of Inheritances we ſhall find good matter to touch our conſciences, for *quod naturalis lex et divina atque adeo etiam æterna dictat eſſe faciendum, hoc neceſſario eſt in conſcientia faciendum.* Since therefore as I have ſhewed you, natures law, and the example of all Divine lawes doe warrant our common law, in the courſe of Inheritances, we ought feare-fully to attempt the altering of them, and without feare reduce them to proper and naturall courſe: But before I write any more of the avoyding of eſtates taile, ſince the manner of doing by recovery is diſpleaſing to ſome perſons, I thinke it not amiſſe to ſhew you mine opinion thereof: firſt therefore I confeſſe that Recoveries are likewiſe inſtruments uſed to cut off eſtates taile remainders and reverſions, and the cauſe why the tenent in taile is barred, is in reſpect of the aſſets onely which is or may be recovered in value; and though you may ſay that this recovery is but a fiction of the law, yet *lex fingit ubi ſubſiſtit æquitas*, and though this value to be recovered

is:

is posted over to the common Cryer, who in ordinary presumption shall never bee able to answer all values recovered against him; yet if the father whom the law presumeth to be carefull enough of continuing his Inheritance, shall bee content to seeke recompence where noneis to be had, how doth the law offend in supposing this to be done for the best? and if it were done for the best, what injury should the Heire sustaine, or the law offer? besides the recovery being but a feoffment of Record in his owne nature changeth no use, except some new use be declared; neither should I bee curious how these intailes were cut off (so as it were in forme of law) since me thinkes, it skills not whether an unthrifty twigge be cut off with a sword, or with a hooke, for *Major est diversitas respectu materie quam forme*, and it is more reasonable or naturall to accept a recompence of him that hath nothing, because he may have enough, then to provide for a possibility of escheat, whereto the aspect of our law hath never reached, because it is unnaturall.

Thus

Thus you have partly heard what Divine and humane lawes esteeme of Inheritances, and have entailes prepostrously altering the forme of Inheritances are valued.

And lastly that the cutting off by Recoveries is lawfull enough, so as it bee to a lawfull end, and that to restore the common law to her proper and most ancient course is an Act well deserving; but this hath bin gathered only out of the lawes: and the next that follow in order are the persons, who of necessity must be either Donors, Donees or their heires: the Donors are either parents, or strangers: by parents, I meane principally the father who is called so of *pastater, quasi omnia servans*, which etymology doth well expresse the office of a father to consist principally in providing and keeping for his Children, in respect of whom he is onely a father; and this naturall care and fatherly provision our common law seemeth to favour: for whereas feoffments made amongst strangers, if they be not cloathed with good and valuable consideration, the use of the gift is not changed, but the donee remaineth seised to the use of the donor for want

of reciprocall exchange of gaine; yet if the father infeoffeth his child, the consideration of fatherly affection is prized recompence enough to change the use, and this holds true of all consanguinity: but the heire which is so called *ab hærendo, quia hæreditas sibi hæret*, hath in law a more mutuall valuation with his father, and a greater interest in the Inheritance then the younger sort; for if the heire endoweth his wife by the consent of his father, this endowment is good; and if the sonne dyes, the wife shall have her dower though the father liveth, but this holdeth not of the younger sonnes, by which it appeares that our law admits the heire an interest in his Inheritance during his fathers life; but if this should seeme strange, then may it bee more plainly proved out of Mr. *Glanvile*, who putting some difference between *quæstum*, & *hæreditas*, saith that the Common law would not suffer the father to give any part of his Inheritance to his yonger sonnes without the consent of his heire, his words to that purpose are these, *si quis plures habuerit filios mulieratos, non poterit de facili præter consensum hæredis sui filio suo post-nato de hæreditate*

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sua quantamlibet partem denare. If any man shal have divers sonnes lawfully begotten, he may not easily without his heires consent give any part of his Inheritance to his yonger sonne and yet after he granteth that the father may give part to a stranger, or to his bastard, which might seeme hard, if he had not shewed the reason thereof, viz. *quia si hoc esset permissum, accideret inde frequens prius natorum filiorum exhæreditatio propter maiorem patrum affectionem quam sæpe erga post-natos sum habere solent.*

Thus may you see how much our law esteemeth and defendeth the birth-right of the heire, not onely in giving him private power by the consent of his father to endow his wife, but likewise in restraining the father from following his peculiar affection in bestowing his Inheritance contrary to the meaning of the law, and this for ought I know remaineth law to this day; neither is it unreasonable that the heire whom the law onely burdeneth with discents of warranties, debts, and such like, should by the law reape onely the advantage of Inheritances.

Much more equally therefore to deale out

common law provided for our heires, then these abortive estates taile; and yet of entailes I confesse, that some are more tollerable then others, because they doe lesse manacle the pure and naturall course of Inheritances: for when lands are given to the eldest sonne, and to the heires of his body, this varieth not much in the order of descent from fee simple, because the immediate heire male or female shall by this gift enjoy the Inheritance otherwise due, and were it not for defrauding Creditors, and abasing the price when a sale is enforced, and some other inconveniences, I should thinke it just; but if lands be given to a man and to his wife, and the heires of their two bodies, if the wife dying leave but a daughter, though afterwards the Husband marrying againe hath issue a sonne and dyes, by this gift entaile the daughter shall dis-inherite the sonne against the expresse rule of all lawes. Againe if lands bee given to the heire apparent, and to the heires males of his body, with remainder over to the heires male, by this gift the heires generally are against all right robbed of the birth-right: which fashion

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of reſtraining of Inheritances from their due forme doth ſeeme to me moſt unjuſt; and this I affirme the rather becauſe wee find no ſuch gift expreſſed in the ſtatute of *Weſt* 2. though I confeſſe they are taken to be comprehended within the meaning thereof; but becauſe this word heires in his equivocate ſence hath divers wayes to be underſtood, it were meete I ſhould diſcover my meaning thereby, which principally intendeth the firſt begotten ſon, who onely can bee heire according to maſter *Glanvils primogenitus patri ſuccedit in totum, ita quod nullus ſuorum fratrum partem inde jure petere poteſt*, the firſt begotten ſonne ſucceedeth the father in all, ſo as none of his brethren can lawfully claime any part thereof, in whoſe abſence the ſecond brother ſucceedeth, and ſo in order; and in want of brothers the ſiſters are heires: for Mr. *Glanvile* likewiſe ſaith, that *ſi non reperiantur fratres, vocande ſunt ſorores quibus premortuis earum liberi vocantur*. And this hath not onely bin a continuall practiſe of the common law, but it is likewiſe well warranted by the Commandement of Almighty God, as may appeare by his Anſwer 27. *Numbers*, when

Moſes delivered unto him the petition of the daughters of *Salphaad*, when after their fathers death without ſonnes they demanded poſſeſſion of his Inheritance amongſt their Couſens, which was, *Iuſtam rem poſtulant filiæ Salphaad; da jis poſſeſſionem inter cognatos patris ſui, et ei in hæreditatem ſuccedant; ad filios autem Iſrael loquêris hæc: homo cum mortuus fuerit abſque filio, ad filiam tranſibit hæreditas; ſi filiam non habuerit, habebit ſucceſſores fratres ſuos.* The daughters of *Salphaad* doe aske that which is juſt, give them poſſeſſion among their fathers kindred, and let them ſucceed him in the Inheritance; and to the children of *Iſrael* theſe things ſhalt thou ſpeake: when a man ſhall dye without a ſonne, the Inheritance ſhall paſſe to his daughter: if hee hath never a daughter, his brethren ſhall ſucceed: and this hath not bin onely commanded, but practiſed in all ages, for women have ſucceeded in Kingdomes, and in the greateſt Inheritances.

If I have failed in the beginning of this diſcourſe to prove that Inheritances at our common law doe follow to all purpoſes their true patterne ſet forth in the lawes Divine,

let

let this I pray, serue for a full supply therein, since hereby you may perceiue they agree to all intents, and least we should take this as a law limited to continue some short time, it followeth, *erit que hoc filiis Israel sanctum lege perpetuum*: worthily therefore was *lex Voconia* in the ciuill law, which excluded women from their Inheriting, abrogated as unworthy of the reputation of a law, since it swarveth from the forme of God his law; and to this purpose hath St. *Augustine lib 3. De Ciuitate dei, lata est Romæ lex illa Voconia, ne quis hæredem fœminam faceret, ne unicam filiam: qua lege quid iniquius dici aut cogitari possit ignoro.* The *Voconian* law is made at *Rome*, by which it is prohibited that daughters or a daughter shall inherit, then which law I know not what can bee said or deuised more wicked: who is he that, understanding the high pleasure of Almighty God concerning the bestowing of his Inheritance, but would fearefully alter a law so everlastingly hallowed? and what forme perceiving that his father through ignorance had offended this law, and knowing that hee hath power to amend this fault, but he will without feare and with

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all speed endeavour to settle his Inheritance in such course as hee undoubtedly knowes shall best please Almighty God?

But least I dwell too long on this point, I must speake somewhat of the instrument or meanes whereby entailes are made, which sometimes impaire, sometimes amend that which is made.

Entailes therefore are either accomplished by feoffment, by deed, or by testament.

Feoffment is a gift or grant performed by delivery of seizin.

A deed is an instrument likewise constitutive, conveying some estate by inrolement.

A testament is the just sentence of the mind. All which do agree in one point, viz. that our wills and consents are the causes without the which not any of them can be perfected; for as the testament is onely the will of the testator, so is neither a feoffment nor deed worth ought, but by the consent and will of the feoffer or donor. And as they agree in this (which is all the substance of a testament) so doe they differ in the solemnity or maner of accomplishing.

For

For our law preventing rashnes in passing so large an estate as a Lease for life, or an estate of Inheritance, have to feoffments and deeds knit a necessity of Livery, and inrollment to remaine as pregnant witnesses that the feoffment or deed was made by good advice, but to wills though they be of no force during the life of the Testator, no other solemnity is required but the death of him that made them, which prevents all possibility to amend ought that is amisse.

Another difference you may likewise note, (which I have, though to another purpose) touched before, viz. deeds and feoffments require recompence to make the use change, but wills doe passe the estate they containe, and the use without regard of recompence; these imperfections and differences were the cause why wills were not entertained in our common law, or at most but in some customary places, as in *Burgh English* where because the Inheritances by those customes descended to the youngest sonne; the common law therefore in favour as I ghesse of the heire, permitted there the use of wills as a meanes to reduce the customary

mary lands to th'heire at common law, and this I ghesse so, because in the common law they were utterly disabled to convey Inheritances before the statute of 32. *H. 8. cap.* 1. except as I have said, where custome had usurped on the common law.

And well was it considered in my judgment, that Acts done at so unfit times as wills are usually made, should not dispose of matters of so great weight as Inheritances, for our forefathers thought it not lawfull in extreames of sicknes, by scoffments to passe their Inheritances, *in extremis tamen agenti non est hoc cuiquam hactenus permissum, quia possit tunc immodica fieri hereditatis distributio, si fuisset hoc permissum alliqui fervore passionis instantis et memoriam et rationem amittit.* But to a man in extremity of sicknes this is not permitted, because then an immoderate distribution of the Inheritance might bee made, if this were lawfull to him who looseth his memory, and reason by the fervour of his present passion. This was the common law in Mr. *Glanvile* his time, and yet remaineth for ought I have read, whose authority I doe often remember as most worthy, being one of the most ancient

cient Iudges of our law, who as he hath delivered this of feoffments, so of wills he saith, *possit tamen huju smodi donatio in ultima voluntate alicui facta ita tenere, si cum consensu heredis, & ex suo consensu confirmaretur*, yet saith hee, such a gift made by will to any man may hold, so as it be made by the consent of the heire, and confirmed by his consent; most just therefore in my judgement is our common law herein, which suffereth not the father in extremity of sicknes to dispose of his Inheritance, since few men pinched with the messengers of death can afford reason his proper use.

Since therefore wills are for the most part made rather out of fervor of passion then by advised deliberation of the mind, and since som are made by compulsion, other by ignorance, and some to content the importunity of others, when yet they hope to live longer then they happen, in all which cases they are esteemed as no wills, for *voluntas est que neque per vim neque per ignorantiam fit*, since I say all these inconveniences are likely to happen, and may scarcely bee avoyded in wills; as few estates taile are much to be regarded, so none lesse then such as are composed by will: unworthy therefore shall I

 esteeme

esteeme this instrument to have power concerning Inheritances, though it bee permitted by a late statute.

But since the Civill Law is the true mother and maintainer of wills, it were not amisse to shew you that therein the power of wills is not absolute in disposing of Inheritances, which any man that doubts may see in the Title of *Querela inofficiosi*, which is said to be *subsidiarium remedium à quo petitur a iudice ut testamentum contra pietatis officium ex suo officio rescindat, et detur liberis et parentibus, fratribus verò et sororibus si turpes personæ scriptæ sunt.*

Thus you may see that even the Civill law hath compassion on Inheritances, and giveth the Children power as it were to Cancell their fathers wills if they be against the office of piety, and what almost can be more impiety? on the fathers part then to disinherite his first begotten Sonne, his issue, for none other cause then for that Almighty God who onely maketh heires, made his Sonnes heire, a daughter or daughters, and rather to substitute another who can bee no more his heire then *puer supponitius*, that is, a Changling can bee

Child

Child to her that never bare him, for *nemo est heres viventis*: how therefore should one that liveth make an heire, since there can bee no heire till the father be dead.

This act therefore as it is unnaturall, so is it impious, for all sinnes are most grievous that are most unnaturall; but because it may here be alledged that wills import a charge or Commandement of the division necessary to be observed, it behooveth me to prevent that objection.

Which answer first therefore me thinkes it were absurd to say generally, that all wills containe a necessity to bee performed, since some wills are impossible, other unlawfull, and many doubtfull to all; which if wee should tye a necessity of fulfilling, we should force things unpossible, things unlawfull, and things doubtfull, which were very unmeet: but if some bind us, and some leave us at liberty, then must the difference proceed either of the persons, or of the things devised, or some other circumstances: touching the persons, I make no doubt but some will call in question the duty of the Child, that re-

deives the benefit of the gift, to the father who beſtowes the gift, as a forceable argument againſt me, to which duty I could give great power and reſpect, if it were onely ſpoken by the younger ſonnes: for ſince they cannot claime any right in the Lands deviſed, but by the will, it were ſomewhat reaſonable that the father having for them injured his Inheritance, ſhould reſtraine them from doing more wrong, by plucking the Reverſion out of the heire.

On the other ſide, if the father deviſeth his Lands to his heire, becauſe if this deviſe had not beene made, the Inheritance ſhould notwithſtanding have deſcended to the heire, as it were hard to clog his free right by improper condition, ſo it were reaſonable for him to uſe any lawfull meanes to cut off his unjuſt fetters; for the common law ſaith, that if the father deviſeth Lands to his ſonne and heire in Fee-ſimple, the heire may waive or forſake the deviſe, and hold himſelfe in by deſcent, as if no will had beene ever made: otherwiſe it is, if the deviſe bee to a younger brother, or to a ſtranger, who are onely tyed

to the power of the will, if they will enjoy their estates created by the will: this hath beene said to prove unto you, that the fathers will is not of force absolute to binde the heire where the Law investeth a former right in him, by which I could inferre that the fathers commandement being but an expressing of his will, cannot be of any better force then his will. As lawfull therefore would I thinke it for the sonne and heire to cut off an intaile devised by his father, notwithstanding his implyed commandement to the contrary, as it is for him to seeke remedy for a dangerous wound given to him by his father in his displeasure, though hee should charge him to the contrary. But if this be not enough concerning *imperium*, or *mandatum Patris*, wee have a rule that saith, *verba imperativa ad privatum favorem prolata necessitatem non inferunt, sed consilium*. If therefore some private favour hath bred this Commandement, as it appeareth most evidently that it hath, then doth it not inferre necessity, but Counsell, which Counsell may either bee followed or neglected, according to the conveniency of the

cause

cause. But since this counsell as I have shewed you, tendeth to the crossing both of Gods Lawes, and the worlds, I would thinke that the heire should very weakely be compelled to obey it, especially if wee remember that *Mandatum est temporarium, hoc est, mandantis morte expirare*, which seemeth reasonable, considering that a commandement being a thing meerely personall, as given in the person of a father, must of necessity take his ending with the person, for *quod personæ cohæret, morte extinguitur*. And this holds against the greatest persons in the world, for *mortuus est rebus humanis exemptus*, and therefore not allowed to moderate amongst the living. If this therefore holdeth amongst Princes, much more doth it hold among private persons, betweene whom it hath no generall force while they are living, for though the wife oweth obedience to her Husband, yet if he commands her to release her Dower, shee is not bound to obey him. So likewise if the father commands his heire to give his Inheritance from his Children, neither was this commandement lawfull in the father to give,

nor

nor in the ſonne to obey, becauſe it is unnaturall in them both.

But to weigh this matter more ſtrictly, it ſhall not bee amiſſe to looke into the policies inducing us to make eſtates tailes, and policies perſwading the contrary, which policies are beſt judged by their intentions, the principall inſpection whereof addeth or detracteth from either of them.

In *Baintons* caſe I have noted onely one reaſon urged in the behalfe of theſe entailes eſpeciall: viz. 1. the Fame of the giver this is divided into two branches, Fame in continuing in his Name with advancement, and Fame in being founder of a houſe. And firſt concerning the manner, it is a thing wherein we have no property, for ſometimes Dogges and Horſes are called by our greateſt Sir-names, and ſo are other men, and perhaps ſuch as are our enemies. And touching the founding of a Houſe, though I confeſſe it a thing worthy of memory, yet were this foundation much better beſtowed on ſome of our neereſt bloud, and on ſuch as the law perſwades us ſo to doe, and ſo

may wee assure our selves, that this house, or houses thus founded are our owne, being built upon our owne ground, I meane such Children as are proceeding from our owne Loynes, by benefiting of whom wee benefit our selves, they being part of our selves; and this course is most just and freest from offences; for if wee leave our Inheritances to discend according to the motion of the Law, or bestow them on whom they belong in law, if any offence shall happen, it may onely bee imputed to the offence of the law, by whose Act it is done without any partiall respect either of Names or other private affections, and who can bee safer from offending then hee which containeth himselfe within the compasse and Buckler of the Law, since *sub clypeo legis nemo decipi dicitur?* And by this policy strangers, or remote Cousins, shall not more triumph of your greater affection then your naturall and living Children; your Children shall neither tempt their charity, nor repine to see their Cousens enriched

enriched with that which is their right, nor repent their long obſerved duties to their fathers.

But otherwiſe well may they thinke that father unkind who preferreth to a name which properly is none of his, before his owne bloud which aſſuredly is his; for it is plaine, that another man his name cannot bee mine, though pronounced and written to all purpoſes like mine, ſince every name (bee they alike or unlike) is peculiar to diſtinguiſh every perſon, and cannot bee common to another man and to mee, as *Homo* is to all men. But this my meaning is more evidently declared in the Lawes of Armory; for though my ſecond Brother his Sonne beareth a name like mine to all purpoſes, yet as *nullam ſimile eſt idem*, ſo in his Coat Armour which belongs to his name, hee beareth a Creſſant for his fathers difference, which difference ſheweth the name and coat to be none of mine, ſince to my Armes due to my name no difference belongeth; whereas contrariwiſe my Daughters

by quartering my Coat Armour with their Husbands, doe moſt truely repreſent both my name and Armes, for as the Coat is knowne by the name, ſo mutually the name is knowne by the Coat.

Since therefore wee live in our heires after our deaths, it were good policy that as wee reſpect our eſtates while we live, ſo wee ſhould provide in like manner for thoſe in whom wee live after our deaths, viz. our lawfull heires. And hee that diſpoſeth his Inheritance otherwiſe, in my opinion doth like him that hath a Hat made for his head, and weares it on his heele; or like him that gives all to his Couſins or friends till he beg himſelfe.

Since therefore the Lawes of nature (which cannot bee diſpenſed withall) are contrary to eſtates in ſpeciall taile, in that moſt entailes convey unnaturally our Inheritances from our heires to others, ſince the Divine written Lawes have expreſſed a forme of inheriting contrary to the forme of all entailes, which wee ought not to alter, becauſe *præceptum poſuit, et non præteribit*

bit, *Psalme* 144. and since the Common Lawes of this Realme doe expostulate their ancient formes of Inheritances, as most commodious for publike good, and since the statutes of this present time have committed power into your hands, whereby you may either benefit or prejudice your heires, for *qui non defendit injuriam neque propulsat a suis cum potest, injuste facit*, and since *nemini vim et injuriam facere videtur qui suo jure utitur*. Since the statute of *West* 2: neither commandeth, forbiddeth, nor punisheth, but is onely a permissive authority to doe that which before the Statute was unlawfull. And to conclude with Lawes, since as Saint *Thomas* saith, *nituntur leges humana cognintione atque humana prudentia, per quam non potest satis certò constituere de futuris*, and since succeeding inconveniences by their common events have compelled our forefathers to make breach into their conditionall gifts, in acknowledging the errors of them that first craved this liberty, I cannot see why you should any longer continue that which deserveth to be altered, except you thinke inventions of men better then the Lawes of

God. And hereſies in Law (which are ſaid to be ſometimes *de immunitate*) better then the ancient poſitive Lawes of this Realme, except you think that nature have more bound you to advance others then your owne Children, except you thinke that other men have begotten better Children then your ſelfe, except you more reſpect a like name of another then the true diſcent of your owne bloud, except you mind to ſow hatred among your conſanguinity; except you intend to offer open wrong to your heire, for *patia ſunt malefacere, et malefacta non obviare*, and except you would vainely and *Babylonically* erect a Tower againſt the omnipotent power of God himſelfe, which building cannot long ſtand, nor proſper. Be not therefore I beſeech you, miſled with the bad example of many that have bin negligent in cutting off entailes, for *non minùs ardebunt qui cum multis ardebunt*; and *multitudo delinquentium non excuſat peccatum*, and though therefore many dooffend in this manner as offenders for company, let them remember the fearefull curſe pronounced by the Prophet *Eſa* 24. *terra infecta eſt ab habitatoribus*

ribus ſuis qui tranſgreſſi ſunt leges, mutaverunt jus, et diſſipaverunt fœdus ſempiternum: propter hoc maledictio vorabit terram. And this I doe the rather apply to my preſent purpoſe, becauſe I could never (after long obſervation) find any family continue in the heires male three diſcents after an entaile made and continued to the heires male, by which I gheſſe they are not watered with heavenly bleſsings. And with this I will conclude, ſaying that I will adde one doubt, viz. that though you will forbeare to cut off the entaile, yet are you not ſure, that they to whom you will leave it will doe ſo, and if they cut it off, you ſhall joyne hands with them in an unnaturall act.

FINIS.